

SERVICE DATE - OCTOBER 16, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42017

KONICA IMAGING U.S.A., INC.

v.

WILLIG FREIGHT LINES, INC.

Decided: October 12, 2000

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This complaint arises out of a court action in the United States Bankruptcy Court for the Northern District of California in Willig Freight Lines, Inc., v. Konica Imaging U.S.A., Inc., Adv. No. 96 3 680 DM. The court proceeding was instituted on November 7, 1996, by Willig Freight Lines, Inc. (Willig or defendant),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from Konica Imaging U.S.A., Inc. (Konica or complainant). Willig seeks undercharges in the amount of \$105,120.67, allegedly due, in addition to amounts previously paid, for services rendered in transporting an estimated 600 to 700 shipments of chemicals, dry plates, films, and other film related commodities. The shipments were transported from Konica's facility at Ontario, CA, to points in Arizona, Nevada, Oregon, and Washington, between October 18, 1992 and August 25, 1994. By order dated March 31, 1997, the court stayed the proceeding to enable complainant to seek a determination by the Board of issues of rate reasonableness, unreasonable practice, and tariff applicability.<sup>2</sup>

Pursuant to the court order, Konica, by complaint filed September 23, 1997, requested the Board to resolve issues of rate reasonableness and unreasonable practice. By decision served

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<sup>1</sup> On October 19, 1995, Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of California, Case No. 95-33940 DM.

<sup>2</sup> The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig. Although complainant made specific reference to the content of the order, the court order itself has not been introduced into the record in this proceeding. We note that copies of the subject court order have been submitted in other Willig proceedings before the Board (STB No. 42007 and STB No. 42014) and take official notice of the court order.

October 17, 1997, the Board established a procedural schedule for the submission of evidence. On December 17, 1997, complainant filed its opening statement. Willig filed its reply on January 15, 1998, and complainant submitted its rebuttal on February 2, 1998.

Complainant asserts that defendant's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates defendant now seeks to collect are unreasonable.<sup>3</sup> Konica maintains that the freight charges originally billed by Willig and paid by Konica were discount rates mutually agreed upon by the parties, and that Konica relied on the agreed-upon rates in tendering its traffic to Willig.

Complainant states that, prior to April 1991, defendant was used to perform both California intrastate and interstate service from a shipping origin of Irvine, CA. The rates and charges for that transportation service were the subject of an agreed-upon discount filed in a Willig interstate tariff and in a California intrastate contract carrier agreement. Thereafter, the origin point for Konica's traffic was shifted to Ontario. Complainant asserts that the parties agreed that the discount rates and charges applicable to the Irvine origin point would also apply to the new Ontario origin point, but it acknowledges that Willig neglected to publish the terms of the agreement in an appropriate tariff.

Konica notes that, from approximately April 4, 1991, to May 13, 1991, Willig rated Ontario originated shipments without an applied discount. The billing errors were detected on pre-payment audit, corrected freight charges reflecting the applicable discounts were issued, and the corrected freight bills were paid by Konica. Complainant states that discounts were applied in subsequent Willig billings for Ontario-originated shipments and that the freight bills were paid as rendered.

Complainant supports its assertions with an affidavit from Stephen W. Riddell, Warehouse Manager for Konica's Ontario facility. Mr. Riddell states that his responsibilities include the routing of Konica's shipments, the selection of carriers to handle Konica's traffic, and negotiating freight rates with the carriers. According to Mr. Riddell, Konica was assured by Willig that the same published rates and discounts applicable to Irvin-originated shipments

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<sup>3</sup> Complainant also moves for summary disposition of this proceeding based on defendant's failure to furnish certain tariff and other documentation (Vertex information) specified in Appendix A to the Board's procedural decision served October 17, 1997. Defendant asserts that the Vertex information had in fact been previously provided to complainant while this matter was pending before the bankruptcy court. We note that our procedural decision served October 17, 1997, directed defendant to provide the required materials "if it has not already done so" (emphasis added) (procedural decision at 1) and that, based on submissions included with complainant's opening statement, the Vertex information was available to complainant (Verified Statement of Raphael J. Janer, at 2). We conclude that defendant has provided complainant with the required Vertex information and deny complainant's motion for summary disposition.

would also apply to shipments moving from Ontario. He further states that he had repeatedly advised Willig sales representative John Winchester that application of the agreed-to discount rates was essential to Konica's continued use of Willig services.<sup>4</sup> Mr. Riddell asserts that other motor carriers offering competitive service at rates comparable to or below those originally assessed by Willig were available to complainant and that Konica would have terminated its use of Willig's services had defendant attempted to eliminate the negotiated discounts.

Complainant also submitted a verified statement from Raphael J. Janer, a transportation consultant and auditor associated with D & J Associates, Inc. Mr. Janer reviewed the balance due freight bills in issue, noting that defendant seeks to collect freight charges without the application of the originally applied discounts. He prepared a series of comparative exhibits based on seven sample shipments and directed his comments solely to the issue of rate reasonableness.

Defendant's statement consists of legal argument of counsel and a declaration of Rodney Johnson, President of Trans-Allied Audit Co. Inc.<sup>5</sup> Counsel contends that the facts submitted by complainant are insufficient to sustain an unreasonable practice finding and that complainant has failed to demonstrate that the rates Willig here seeks to collect are unreasonable. Mr. Johnson explains the process used in auditing the freight bills at issue and attests to the rate accuracy of the amounts claimed in the balance due bills. Attached to Mr. Johnson's declaration are copies of approximately 600 balance due freight bills issued by defendant that contain originally issued freight bill data as well as "corrected" balance due amounts. An examination of these balance due freight bills indicates originally assessed charges based on minimum rates and rates to which discounts ranging from 20% to 60% were applied that were significantly below newly assessed charges that reflect the elimination of originally applied discounts and the application of higher minimum rates. The balance due bills contain a reference to item 792 of tariff WLIG 603 and indicate that Ontario, CA, is not named in that tariff item.

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<sup>4</sup> Attached to Mr. Riddell's affidavit are copies of internal Willig documents relating to Konica prepared by or identifying John Winchester as sales representative, consisting of the following:

(a) A Willig Traffic Analysis dated 5/14/92 identifying Ontario as one of Konica's shipping locations, indicating present Willig tariffs, and containing the notation "Discount will ensure business to our Direct Points."

(b) An internal Willig memorandum dated 8/26/92 locating Konica at its Ontario address containing the notation "Request was made for same ICC Provisions as codes 65688, 64263, 64264."

(c) A Willig Traffic Analysis dated 8/31/93, indicating Konica's shipping address in Ontario with the notation "ICC Refile in Sec 4-3."

<sup>5</sup> Trans-Allied was the organization retained by the estate of Willig to audit freight undercharges for the 3-year period that preceded defendant's bankruptcy filing.

## DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.<sup>6</sup>

Section 13711(a) provides, in pertinent part, that “It shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to [the jurisdiction of the Board] . . . to attempt to charge or to charge for a transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section.”

It is undisputed that Willig no longer transports property. Accordingly, we may proceed to determine whether the defendant’s attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 13711(a) determination. Section 13711(f) defines the term “negotiated rate” as one agreed upon by the shipper and carrier “through negotiations pursuant to which no tariff was lawfully and timely filed and for which there is written evidence of such agreement.” Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here the record contains approximately 600 balance due freight bills issued by defendant that include originally assessed minimum charges and charges to which discounts of 20% to 60% were applied that are consistently and substantially below the charges defendant is now attempting to collect. The record also contains copies of internal Willig documents indicating an effort on the part of Willig’s sales representative to secure discount rates for Konica’s Ontario-originated shipments. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. Mar. 31, 1997) (mem.) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted

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<sup>6</sup> Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, complainants before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhineland Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of complainant’s liability for the rates sought.

establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Willig and paid by Konica. The consistent application in the originally issued freight bills of charges to which discounts were applied as well as assessed minimum rates that were substantially below the charges defendant is here seeking to assess support Mr. Riddell's unchallenged assertions and reflect the existence of negotiated rates. The evidence further indicates that Konica relied on the agreed-to discount rates in tendering its traffic to Willig and that complainant would not have used Willig's services had respondent attempted to charge the rates it here seeks to collect.

In exercising our jurisdiction under section 13711(b), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 13711(b)(2)(E)].

Here, the evidence establishes that negotiated discount rates were offered to Konica by Willig; that Konica reasonably relied on the offered discount rates in tendering its traffic to Willig; that Willig did not properly or timely file a tariff providing for such discount rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Willig; and that Willig now seeks to collect additional payment based on higher undiscounted rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from Konica for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainant's motion for summary disposition is denied.
2. This proceeding is discontinued.
3. This decision is effective on its service date.
4. A copy of this decision will be mailed to:

The Honorable Dennis Montali  
United States Bankruptcy Court for  
the Northern District of California  
P.O. Box 7341  
San Francisco, CA 94120

Re: Case No. 95-33940 DM  
Adv. No. 96 3 680 DM

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary